

IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Arbitration Case No.9 of 2005

Date of Decision: August 6, 2007

M/s Inderjit Mehta Construction Pvt. Ltd.

....Petitioner

through Mr.P.C.Markanda , Sr.Advocate
with Mr.Naresh Markanda, Advocate

v.

Union of India and another

....Respondents

through Ms.Deepali Puri, Advocate

CORAM: HON'BLE MR.JUSTICE VIJENDER JAIN, CHIEF JUSTICE

1. Whether Reporters of Local Newspapers may be allowed to see the judgment?
2. To be referred to the Reporters or not?
3. Whether the judgment should be reported in the Digest?

VIJENDER JAIN, CHIEF JUSTICE (ORAL)

A short controversy has arisen in this petition under Section 11 of the Arbitration and Conciliation Act, 1996 (hereinafter to be referred as, 'the Act') filed by the petitioner with regard to the interpretation of what constitutes 'excepted matter'. The arbitration clause is at page 3 of the paperbook which is as under:-

“70. Arbitration.- All disputes, between the parties to the Contract (other than those for which the decision of the CWE or any other person is by the Contract expressed to be final and binding) shall, after written notice by either party to the contract to the other of them, be referred to the sole arbitration of an Serving Officer having degree in Engineering or equivalent or having passed final/direct

final examination of sub division II of Institution of Surveyors (India) recognized by the Government of India to be appointed by the authority mentioned in the tender documents.

Unless both parties agree in writing such reference shall not take place until after the completion or alleged completion of the Works or termination or determination of the Contract under Condition Nos.55, 56 and 57 hereof.

Provided that in the event of abandonment of the Works or cancellation of the Contract under Condition Nos.52,53 or 54 hereof, such reference shall not take place until alternative arrangements have been finalized by the Government to get the Works completed by or through any other Contractor or Contractors or Agency or Agencies.

Provided always that commencement or continuance of any arbitration proceeding hereunder or otherwise shall not in any manner militate against the Government's right of recovery from the contractor as provided in Condition 67 hereof.

If the Arbitrator so appointed resigns his appointment or vacates his office or is unable or unwilling to act due to any reason whatsoever, the authority appointing him may appoint a new Arbitrator to act in his place.

The Arbitrator shall be deemed to have entered on the reference on the date he issues notice to both the parties, asking them to submit to him their statement of the case and pleadings in defence.

The Arbitrator may proceed with the arbitration, exparte, if either party, inspite of a notice from the Arbitrator fails to take part in the proceedings.

The Arbitrator may, from time to time with the consent of the parties, enlarge, the time for making and publishing the award.

The Arbitrator shall give his award within a period of six months from the date of his entering on the reference or within the extended time as the case may be on all matters referred to him and shall indicate his findings, along with sums awarded, separately on each individual item of dispute. The Arbitrator shall give reasons for the award in each and every case irrespective of the value of claims or counter claims.

The venue of Arbitration shall be such place or places as may be fixed by the Arbitrator in his sole discretion.

The Award of the Arbitrator shall be final and binding on both parties to the Contract.”

My attention has been drawn to order dated 22.10.2003, Annexure P-4 passed by the Arbitrator. Before making of the award on 22.10.2003, it seems that the petitioner had filed an application that the *persona designata* has not referred two claims of the petitioner i.e. (a) Claim 8(A): Extra length and extra counter fort to vift and retaining wall storage shed 36 x 18m Rs.25,00,000.00 Revised to Rs.49,21,600.00; and (b) Claim 8(B): Combined Footing in lieu of independent footing of column and retaining wall of storage shed Rs.9,00,000.00 Revised to Rs.13,42,700.00. The Arbitrator in its order passed on 22.10.2003 decided that it shall not be adjudicating upon aforesaid two claims for the reason of lack of reference to it as the scope of reference was by the appointing authority in terms of its letter dated 13.2.2003. Against that order, an appeal was preferred by the petitioner before the District Judge, Jalandhar under section 37 of the Act. The District Judge, Jalandhar dismissed the appeal. Thereafter, the present application has been filed under Section 11 of the Act, inter alia praying that the independent Arbitrator be appointed to adjudicate upon the dispute as mentioned in paragraph 7

of the petition which relates to the aforesaid Claims 8(a) and 8(b).

It is contended before me by Mr.P.C.Markanda, learned senior counsel appearing for the petitioner that whether claims 8(a) and 8(b) are excepted matter or not, has to be decided by the Arbitrator and the *persona designata* ought to have referred these claims for adjudication to the Arbitrator. On the other hand, Ms.Deepali Puri, learned counsel appearing for the respondents has contended that pursuant to clause 6-A of IAFW 2249 which is a part of the tender document, these two claims would fall in the category of excepted matter. Clause 6-A is to the following effect:-

“6A. Discrepancies and Adjustment of Errors (Applicable generally to measurement and Lump Sum contracts)- The several documents forming the contract are to be taken as mutually explanatory of one another, detailed drawings being followed in preference to small scale drawings and figured dimensions in preference to scale.

In the case of discrepancy between Schedule `A', the Bills of Quantities, the specifications and/or the drawing the following order of precedence shall be observed:-

- (a) Description of Schedule `A'/Bills of Quantities.
- (b) Particular Specification.
- (c) Drawings.
- (d) General Specification.

If there are varying or conflicting provisions made in any one document forming part of the Contract the Accepting Officer shall be the sole deciding authority with regard to the intention of the document and his decision in this respect shall be final and binding.

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On the basis of aforesaid clause, Ms. Deepali Puri has contended that the Accepting Officer in respect of the dispute has already given its decision and, therefore, the same cannot be referred to the Arbitrator.

I have given my careful consideration to the arguments advanced by learned counsel for the parties. From the perusal of Clause 6A which deals with discrepancies and adjustment of errors, applicable generally to measurement and lump sum contracts, where claim no.1 for extra length and extra counter fort to viaduct and retaining wall storage shed 36 mtrs. X 18 mtrs. and claim no.2 which deals with combined footing in lieu of independent footing of column and retaining wall of storage shed 15 mtrs. X 6 mtrs., prima facie cannot be said to have fallen within the mischief of this clause. However, I would not like to dwell much on the matter, as it will prejudice the case of either party before the Arbitrator. Suffice it to say that there is a dispute with regard to the interpretation of Clause 6A and its applicability to the claims as enumerated by the petitioner and, therefore, it is the arbitrator who should adjudicate upon the dispute. Therefore, I direct the respondents to refer the dispute in terms of the arbitration clause to the Arbitrator for adjudication in the light of my order. Nothing said herein would prejudice the mind of the Arbitrator.

Petition stands disposed of.

August 6, 2007

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**(VIJENDER JAIN)
CHIEF JUSTICE**